

SUPREME COURT OF THE STATE OF NEW YORK

BERNSTEIN LIEBHARD LLP,

Plaintiff,

v.

SENTINEL INSURANCE COMPANY,
LIMITED,

Defendant.

Index No.: 652726/2015

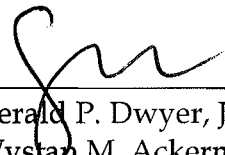
NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that the Order, a true copy of which is annexed hereto, made in the above-entitled action by the Supreme Court was entered in the office of the Clerk of said court on the 6th day of June 2019.

Dated: Hartford, CT
June 25, 2019

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652726/2015

BERNSTEIN LIEBHARD LLP - v. - SENTINEL INSURANCE COMPANY, LIMITED

Assigned Judge: Andrea Masley

Documents Received on 06/07/2019 01:42 PM

Doc #	Document Type
121	DECISION + ORDER ON MOTION, Motion #004

Filing User

Filed by court user.

E-mail Notifications

An email regarding this filing has been sent to the following on 06/07/2019 01:42 PM:

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Hon. Milton A. Tingling, New York County Clerk and Clerk of the Supreme Court

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEYPART 48Justice

Index Number : 652726/2015

BERNSTEIN LIEBHARD LLP

vs.

SENTINEL INSURANCE COMPANY,

SEQUENCE NUMBER : 004

AMEND COMPLAINT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

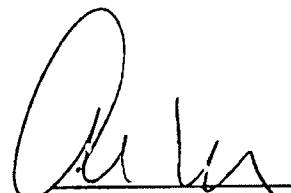
Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Stated as the record. Denied for the reasons stated as the record.

Plaintiff shall submit the transcript to be signed.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):
Dated: 6/6/19


_____, J.S.C.

HON. ANDREA MASLEY

1. CHECK ONE: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☒ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF NEW YORK: CIVIL TERM: PART 48

3 -----X
4 BERNSTEIN LIEBHARD, LLP,

5 PLAINTIFF,

6 -against-

Index No:
652726/2015

7 SENTINEL INSURANCE COMPANY, LIMITED,

8 DEFENDANT.
9 -----X

10 60 Centre Street
11 New York, New York 10007
12 June 7, 2019

13 B E F O R E:

14 THE HONORABLE ANDREA MASLEY

15 J U S T I C E

16 A P P E A R A N C E S:

17 LERNER ARNOLD WINSTON
18 Attorneys for the Plaintiff
19 475 Park Avenue South - 28th Floor
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21 BY: Johnathan C. Lerner, Esq.

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23 Attorneys for the Defendant
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BY: Gerald P. Dwyer, Jr.

VANESSA MILLER
Senior Court Reporter

Proceedings

1 THE COURT: So in the matter of Bernstein Liebhard
2 against Sentinel Insurance Company, at 10:58.

3 Who's here for Bernstein?

4 MR. LERNER: Good morning.

5 Johnathan Lerner from Lerner, Arnold & Winston, 475
6 Park Avenue, New York, New York for the plaintiff, Bernstein
7 Liebhard. And I have Mr. Bernstein with me as well.

8 MR. BERNSTEIN: Good morning, your Honor.

9 THE COURT: Thank you.

10:57:25 10 And for Sentinel?

11 MR. DWYER: Good morning, your Honor.

12 Gerald P. Dwyer, Jr., Robinson & Cole at 666 Third
13 Avenue, Floor 20, New York, New York. And with me is
14 Christopher Girard of Sentinel.

15 THE COURT: Okay. Welcome. Thank you.

16 Well, this is an interesting motion. So this is
17 plaintiff's post final judgment motion for leave to amend
18 the complaint in this 2015 case. So while I wish things
19 were different, are you not asking me, Counsel, to reverse
10:58:17 20 the first Department?

21 MR. LERNER: No. Actually, we're not, your Honor.
22 I think the way that we have phrased the complaint, I think
23 the way that we have seen the pathway or the roadmap to a
24 successful motion, is that we're not asking to relitigate
25 the facts that went before your Honor and that went before

Proceedings

1 the First Department. We are asking this Court to give us
2 the right to amend our complaint to now conform with the law
3 as the First Department has indicated now exists in New
4 York.

5 I think the way that we have always conceptualized
6 the case was we're entitled to recover for the full amount
7 of the case value as a result of the fire and the suspension
8 and cessation of advertising; that was never an issue
9 decided under New York Law. The only case that had decided
10:59:10 10 it was the E. Eric Guirad matter decision out of New Orleans
11 and Katrina, and the TransCanada decision, at the time we
12 had filed our motion, seemed to indicate that it was
13 supported that. But it wasn't until the First Department
14 ruled in July or -- I'm sorry, late June of last year, that
15 a law firm that earns its fees on a contingency fee basis
16 can only recover under a property insurance policy for its
17 business income losses for income that it would have earned
18 within 12 months. Before the Court issued that decision,
19 that had never been decided. And what the Court noted in
10:59:46 20 its decision is that this issue was not before it on behalf
21 of the plaintiffs because we had never pursued the claim for
22 recovery in that matter.

23 So the amendment does not seek to rehash or
24 relitigate the case as it had originally been theorized and
25 conceptualized and pursued. But rather, now, in accordance

Proceedings

1 with the First Department's holding and the new change in
2 the law, seeks to pursue the claim that the Court has
3 indicated we can now pursue, or that would conform with what
4 the law now is in New York. I know it's nuanced; I know it
5 is a very unique set of circumstances; and I know that we
6 both believed that the law was different. But I think at,
7 this point, all we're looking to do is recover or seek
8 recovery and pursue a claim with a different calculation, a
9 different computation and a different theory of recovery.

11:00:42 10 THE COURT: What about the fact that the First
11 Department said that in addition to not raising it at
12 argument, you also failed to make this request in your
13 original -- I think it was 2013 claim to the insurance
14 company?

15 MR. LERNER: Well, and I think that the way I
16 would respond to that, your Honor, is that every time we
17 submitted a claim to the insurance company, and there have
18 been several modifications of it throughout the course of
19 the case. We constantly reserved our rights. Because at
11:01:18 20 the time, we were operating under the belief that was based
21 on what the law was as we believed it to be, and now that
22 law has changed. I mean, this is really a change in the law
23 that has warranted a motion to now pursue a theory of
24 recovery that had never previously been pursued and that,
25 until the Court ruled, was not the law of New York. You

Proceedings

1 know, obviously, somebody filing a case tomorrow under the
2 same set of facts is going to have guidance. We did not
3 have that guidance. So we did the best we could based on
4 the analysis and the research that was available to us,
5 based on the case law that existed.

6 THE COURT: Can you remind me your original claim
7 as modified? What are the damages you were seeking?

8 MR. LERNER: The claim at the time we appeared
9 before your Honor was somewhere in the \$17 million range.

11:02:08 10 THE COURT: But explain the --

11 MR. LERNER: Oh. The theory of recovery?

12 THE COURT: Yes.

13 MR. LERNER: We believed that we were entitled to
14 the full value of fees that we lost on any cases that we
15 could not sign up during the 12-month period following the
16 fire. In fact, we did not even go out as far as the 12
17 months from the fire. Our claims or lost cases ended in
18 March of 2014. It was not until we were told by the
19 Appellate Division that we could not do that that we were
20 made aware for the first time that we were only entitled to
21 the fee that we would have earned, that we could show that
22 we could've earned within 12 months on the cases that we
23 lost and did not sign up.

11:02:42

24 So we had argued before your Honor that, at the
25 very least would be the quantum meruit. The decision that

Proceedings

1 your Honor issued, which we believed was spot on and had
2 supported us in terms of the full entitlement to the fee;
3 and that's what we briefed and that's what we argued to the
4 Appellate Division. And that's basically the way we had
5 pursued the claim from the beginning.

6 THE COURT: Okay. Thanks. Have a seat please.

7 Yes, sir.

8 MR. DWYER: Thank you, your Honor.

9 First, I do want to say about a year ago, you, on a
10 Friday before Memorial Day weekend, went out of your way to
11 alert us to the fact that a stay had been granted of the
12 trial, and this is the first time we've come back to see
13 you. I do want to thank you for that because that
14 personally was a real benefit to me for that long weekend.
15 And John was further along in trial prep than I was. It
16 actually meant a lot to me and I know you did something to
17 make that happen. So I do appreciate it.

18 THE COURT: Sure.

19 MR. DWYER: Secondly, John's dancing I think as
20 fast as he can, but your question is right. The case is
21 over. And, unfortunately, the First Department has ruled on
22 this exact issue before. Having granted summary judgment in
23 Buckley, having granted summary judgment, "it is error for
24 the trial term to grant plaintiff leave to amend. A summary
25 judgment is based on the facts, not the pleading."

Proceedings

1 Now, let's ask ourselves fairly to take a look at
2 the complaint they actually filed and the amended complaint.
3 Is there any fair construction to say an obstacle to them
4 actually putting in an alternative theory of recovery was
5 their pleading wouldn't permit it? It was a decision, a
6 strategy, by this litigant to pursue an all-or-nothing
7 strategy that didn't work. There's nothing necessary to be
8 amended in the pleading. They're just simply looking for
9 the remand, which was denied. The First Department ruled on
10 this. It's over.

11:05:14

11 Secondly, the First Department was asked in a
12 motion to reargue for exactly the same reasons, the
13 unfairness of that last sentence in its decision, which
14 seemed to suggest theoretically there's some coverage
15 available, shouldn't I get a remand out of that, and they
16 said no. Then there was leave to the Court of Appeals,
17 where, among the things sought, was an opportunity to try
18 the case and prove their damages at trial. Again, another
19 loss.

11:05:52

20 So if we look at Buckley, it would certainly
21 constrain the otherwise infinite allowing of amendments to
22 fit within a structured principled system of jurisprudence
23 where if you don't put a witness on before you close your
24 case, you can't put the witness on later and you can't
25 pretend that the problem was the pleading, because it

Proceedings

1 wasn't. It was a decision to proceed in one way.

2 Unfortunately --

3 THE COURT: And you're talking about the claim
4 that was filed; right? Because that last sentence in the
5 Appellate Division decision where they say there could've
6 been damaged --

7 MR. DWYER: Had they presented a different
8 theory --

9 THE COURT: In the claim; right?

11:06:43 10 MR. DWYER: In the claim, and they didn't, and
11 they didn't even ask for a chance in their brief. So why is
12 that in there? Why is that troubling sentence in there?
13 To provide guidance to this case afterward. But
14 unfortunately, here, for this case, not only are the merits
15 decided finally and fully for Sentinel. No payment is due
16 by Sentinel to this plaintiff period. But a remand, which
17 was an option on appeal, they didn't first elect and then
18 they decided not to do it on reargument. And then finally,
19 the Court of Appeals, when asked to allow a trial to
11:07:24 20 proceed, didn't allow that either for exactly the same
21 reasons, the unfairness that they're complaining of now.

22 Now, I do want to point out they rely on Dittmar
23 quite extensively. Dittmar, -and I draw the Court's
24 attention to Page 503 of that decision, Dittmar is a motion
25 to dismiss, not a motion for summary judgment. Buckley

Proceedings

1 controls summary judgments in this department. Dittmar was
2 a motion to dismiss. And in that case, a late-raised
3 defense that ought to have been -- according to the Court,
4 really felt like it should've been an affirmative defense,
5 but it wasn't, was raised. And here, there was, "moreover
6 it has been held" -- as here -- "a position to test the
7 validity of a complaint when it is not made at an early
8 stage in the litigation, when it could possibly be
9 corrected, but, instead, is reserved until trial, the Court
11:08:31 10 usually will permit amendment and allow the case to be heard
11 on its merits." We've reached the merits. So when is, "you
12 cannot breathe new life with permissive pleading even upon
13 the showing of merit"; that's what the First Department
14 teaches us. In Dittmar, to the extent it's instructive in
15 any way, it's instructive about motions to dismiss, not
16 summary judgment motions.

17 THE COURT: Okay. Thanks.

18 Let me ask you, though, before you have a seat, the
19 reservation of rights doesn't change anything for you, that
11:09:12 20 they reserved their rights when they filed the claim and
21 they modified the claim, they kept reserving their rights.
22 Does that make a difference?

23 MR. DWYER: Not to me. I think once you've
24 reached the merits decision, as the First Department says,
25 "the time to demonstrate the merit of an action or a defense

Proceedings

1 that's challenged on a motion for summary judgment is before
2 the motion is decided. The conclusive effect of the
3 judgment on the merits may not be fatally undermined by
4 allowing the party whose cause is dismissed a second chance
5 to litigate the matter." How are we, in any way, different
6 from that? It's exactly what happened here.

7 Now, it was an election either -- the election was
8 to proceed with one single theory. But --

9 THE COURT: Are the damages that they're seeking
11:10:10 10 now and that I -- the damages that they're seeking now, are
11 they not a subset of what they claimed originally, now it's
12 just a shorter period of time?

13 MR. DWYER: That's not what the First Department
14 found. I mean, if the First Department got it wrong, if
15 there was evidence in the record, well, that's been appealed
16 too. So that's certainly on a motion to re-plead in the
17 trial court, your challenge is to the First Department. But
18 I don't think so. I think the entire claim is predicated on
19 the theory that as soon as we signed up a client, we earn
11:10:51 20 our fee, and that simply isn't what was ruled on.

21 THE COURT: Right. But the one-year period that
22 they're now seeking, now that the First Department has
23 clarified it in New York, is a subset of, they want it, \$17
24 million forever as long as those cases proceeded; right?
25 Or as long as those cases could continue. And the First

11

Proceedings

1 Department said, No, you would have to earn it within that
2 one year; right? That's the decision.

3 MR. DWYER: That's what the decision says. But
4 you also need to figure out --

5 THE COURT: If you just put aside the procedural
6 posture of the case right now and just look at what they did
7 decide, which is, you can get that one year if there would
8 have been any cases that could have been signed up and could
9 have settled or earned fees during that one year; right?

11:11:53 10 So it's a subset of what they originally planned.

11 MR. DWYER: Perhaps it is. I don't think -- I
12 think the decision has been -- that last sentence, is, first
13 off, theoretical. Theoretically, you could've been entitled
14 to some additional payment --

15 THE COURT: Like if they had -- and, frankly, even
16 when I was hearing your argument before, my focus was on how
17 do you prove this, like, what's an expert going to testify
18 at trial; right? And these are contingency fee case, so I
19 guess you could opine that, you know, ten percent would
11:12:30 20 settle within the first year.

21 So anyway, that was my focus when I was writing it,
22 you know, when I was hearing your argument. And it seems to
23 me that's what the First Department is saying that you --

24 MR. DWYER: Well, the First Department is saying
25 two things: One -- and number one, they're saying,

Proceedings

1 theoretically, for future cases, this might be the
2 payable -- those payable during the first-year fees might be
3 available. But here, we have --

4 THE COURT: Otherwise, and here's the other thing
5 that bothered me about the insurance policy, if you don't
6 get that, then this is a -- it's a fake insurance policy
7 because you don't get anything. You could never get
8 anything if you're a contingency fee law firm.

9 MR. DWYER: Well, that's not true. There are -- I
11:13:31 10 mean, the factual -- and I think we went over this at least
11 once before and I think you said this more than once, but
12 here's the thing: The phenomenon --

13 THE COURT: Illusory. Not fee. Illusory.

14 MR. DWYER: It's not illusory because there are
15 cases in the ordinary course that would settle within a
16 year. If you're prohibited from settling a case that maybe
17 came in ten years ago, assuming you have a gestation period
18 in ten years. The problem here is the fire happened just
19 after they started. So, technically, a contingency law
11:14:06 20 firm --

21 THE COURT: It's like a new --

22 MR. DWYER: -- would mature over time.

23 THE COURT: It's a new business.

24 MR. DWYER: It's a new business. So it's not
25 illusory, because, actually, it's part of the original

Proceedings

1 claim, as we pointed out before, there was a lost timing on
2 existing files. In other words, there were missed deadline
3 cases that were part of the claim, or at least were supposed
4 to be, but they never added that to their claim. So they
5 only went with the full value of these cases.

6 Now, another reading of the First Department's
7 decision is that because your agreement with clients is, I
8 don't get paid unless I deliver a financial result since you
9 haven't delivered it, a financial result, you're not
10 entitled to your fee. So there wasn't anything --

11 THE COURT: Right. But the way --

12 MR. DWYER: It's not --

13 THE COURT: Right. But they could go back
14 to -- sorry to interrupt. But you could go back to that
15 hotline and look at all the cases, all the cases that came
16 in through the hotline and went to the other firms; right?
17 And you could see what they didn't get paid or what they
18 didn't -- the cases they didn't get.

19 MR. DWYER: Well, you could, but that presupposes
20 an entitlement. Another --

21 THE COURT: There's a big proof issue.

22 MR. DWYER: Another way of reading this decision,
23 because we're sort of all putting in additional thoughts and
24 facts into this decision, the bottom line is if they thought
25 there was a colorable claim for this claimant and they

Proceedings

1 hadn't lost the opportunity to do it because of this
2 strategic choices they made, they would've remanded
3 originally, or they would've remanded the second time, or
4 the Court of Appeals would have remanded the third time.

5 THE COURT: I get it.

6 MR. DWYER: So, at the end of day, there is
7 finality to this decision.

8 THE COURT: Okay.

9 MR. DWYER: And a motion to amend is merely a
11:16:08 10 device to manufacture a remand.

11 THE COURT: Okay. Thank you. Could you have a
12 seat?

13 So although Sentinel wasn't willing to go with me
14 on this subset idea, the fact is the damages you are now
15 seeking are a subset of what you originally asked for.

16 MR. LERNER: Well, by nature, they would be
17 because --

18 THE COURT: Right.

19 MR. LERNER: -- if we're seeking five years worth
11:16:31 20 of recovery, one year would be consumed within that --

21 THE COURT: Right.

22 MR. LERNER: -- but --

23 THE COURT: And that is what the Appellate
24 Division said, No, no remand. They could have, but they
25 didn't.

Proceedings

1 MR. LERNER: But here's the distinction I would
2 draw on that, your Honor: When you read that last sentence
3 of the decision where it says, the claim is not presented in
4 such a manner and it pursues no such claim that's briefed,
5 what's missing is, And as a result, we hereby preclude them
6 from doing that --

7 THE COURT: They said they -- they denied your
8 requested to remand; no?

9 MR. LERNER: Well, no. What happened is we made a
11:17:07 10 motion to reargue. But a denial of a motion to reargument
11 is not a determination of the claim on its merits. To
12 accept reargument, you have to first determine that there
13 was a misapprehension of the facts or the law. So the
14 denial of the argument in itself just means that they did
15 not believe that there was a misinterpretation of the facts
16 or the law. It's not a determination of --

17 THE COURT: Right.

18 MR. LERNER: -- on the argument on the merits.

19 THE COURT: Sorry. But part of the law is what
11:17:33 20 you do procedurally when you make the decision and they
21 chose not to remand.

22 MR. LERNER: And, again, and we --

23 THE COURT: And believe me, you know they do that.

24 MR. LERNER: And we saw that. But we understood
25 that their hands were tied because we did not ask for it or

Proceedings

1 argue it in our brief, and that they were providing us with
2 a roadmap to say, Hey, we can't do anything about this, go
3 back and make your motion to amend, pursue your claim based
4 on what the law now is because that's the only way that
5 justice can be served here. Again, this is a court of
6 equity, and at the end of the day, for justice to be served
7 where you have a determination made by the Appellate
8 Division as to what the law is now and that law has changed
9 from what had seemingly been the law before that, to throw
10 this man out of court is just so inherently unjust and
11 unfair that we read that decision as giving us the
12 opportunity to come back and pursue the claim based on the
13 different set of facts and different theory of recovery; the
14 different clarification; the different mathematical
15 computations that would now be required to prove it based on
16 what the law now is.

17 THE COURT: I wish it were so. I really do,
18 because I felt my decision was right, and I do believe this
19 is a subset of what you originally sought, and, therefore,
20 the Appellate Division has ruled on it and made its decision
21 and I really have to abide by that decision. I don't like
22 it, but I think I have to and I have to compel based on the
23 law and the -- it seems clear to me that they were saying
24 the end. Maybe I'm wrong. I don't know if you're going to
25 appeal that, but maybe it will be different, but I don't

Proceedings

1 think I can. And I really feel that you're asking me to
2 reverse them and I don't feel comfortable doing that.

3 MR. LERNER: We can make new law, your Honor, some
4 new law. It just seems inherently unjust.

5 THE COURT: Well, which is why there was the
6 discussion of the illusory insurance agreement when I first
7 heard argument.

8 MR. LERNER: Yeah.

9 THE COURT: And, you know, they made their
11:20:01 10 decision, you did the renew and reargue, the Court of
11 Appeals even looked at it. I don't know if I can change
12 what they did.

13 MR. LERNER: Buckley says that it's the facts
14 adduced before it. We're proposing a new set of facts and a
15 new set of argument.

16 THE COURT: Yeah. On a 2015 case.

17 MR. LERNER: I understand. Where we reserved our
18 rights to amend throughout.

19 THE COURT: What's that?

11:20:25 20 MR. LERNER: We have reserved our rights to amend
21 throughout.

22 THE COURT: Yeah. I wish it were different, but I
23 think I have to follow the direction of the Appellate
24 Division.

25 MR. LERNER: Well, maybe sleep on it over the

Proceedings

1 weekend, your Honor.

2 THE COURT: That's actually the Court's decision.

3 And you can get the transcript and I'll so-order it, you

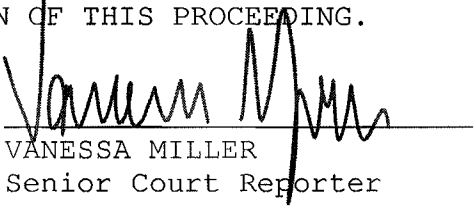
4 know. I think it's compelled by Buckley. So, sorry.

5 Have a nice weekend.

6 MR. LERNER: Thank you, your Honor.

7 *****

8 CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT OF THE ORIGINAL
9 STENOGRAPHIC MINUTES TAKEN OF THIS PROCEEDING.

10 
11 VANESSA MILLER
12 Senior Court Reporter
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